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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 COLENTHIA PAYNE,) Case No. ED CV 09-8627 PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 Commissioner of the)
15 Social Security Administration,)
16 Defendant.)

17 I.

18 INTRODUCTION

19 Plaintiff appeals the decision by Defendant Social Security
20 Administration ("the Agency"), denying her application for
21 Supplemental Security Income ("SSI") benefits. She claims that the
22 Administrative Law Judge ("ALJ") erred when he rejected the functional
23 capacity assessment of examining internist Henry Johnson and when he
24 found that Plaintiff was not credible. (Joint Stip. at 3-7, 16-17.)
25 For the reasons discussed below, the Agency's decision is REVERSED and
26 the case is REMANDED for further proceedings.
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II.

SUMMARY OF PROCEEDINGS

Plaintiff applied for SSI benefits on July 19, 2005, alleging disability since December 31, 2004. (Administrative Record ("AR") 18, 301-04.) After the Agency denied the application, Plaintiff requested an administrative hearing. (AR 279-87.) The Agency denied the request as untimely. (AR 218-22.) While her appeal of this denial was pending, Plaintiff filed a second application for SSI benefits. (AR 90-92.) This application was also denied initially. (AR 59-63, 66.) The Appeals Council subsequently found that there was good cause for Plaintiff's untimeliness and directed that a hearing be held regarding her initial application. (AR 271-74.) On March 3, 2008, the ALJ held a hearing with respect to both applications. (AR 36-54.) On April 25, 2008, the ALJ issued a decision denying both applications. (AR 15-32.) Plaintiff requested review and submitted additional evidence in support of her applications. (AR 13, 190-217.) On October 7, 2009, the Appeals Council denied Plaintiff's request for review. (AR 1-4.) Plaintiff then commenced this action.

III.

DISCUSSION

1. The ALJ's Rejection of the Examining Physician's Opinion

In her first claim of error, Plaintiff contends that the ALJ failed to provide specific and legitimate reasons for rejecting Dr. Johnson's functional assessment. (Joint Stip. at 5-7.) For the following reasons, the Court disagrees.

An ALJ must provide "specific and legitimate reasons" for rejecting an examining physician's opinion, even if that opinion is contradicted. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

1 Nevertheless, "[w]here medical reports are inconclusive, questions of
2 credibility and resolution of conflicts in the testimony are functions
3 solely of [the ALJ]." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d
4 595, 601 (9th Cir. 1999) (quotation omitted).

5 Internist Henry Johnson examined Plaintiff and found that she had
6 a "positive S4 heart gallop," her abdomen was tender to deep pressure,
7 her vertebral column was tender along the midline in the cervical
8 region, and she had limited range of motion of her lumbar spine. (AR
9 383-85.) He also found that she had decreased grip strength in both
10 hands, a positive Phalen's test, positive Tinel's sign, minimal
11 arthritic changes in her left knee, tenderness in the medial portion
12 of her right knee, and depressed reflexes. (AR 384-85.) He noted
13 more than 20 trigger points in Plaintiff's neck, shoulders, back arms,
14 hips, and knee. (AR 388.)

15 Dr. Johnson diagnosed Plaintiff with generalized fibromyalgia,
16 chronic fatigue syndrome, post-traumatic stress disorder, chronic
17 lumbar strain, bilateral tenosynovitis of the forearms and wrists,
18 depression with generalized anxiety disorder, arthritis in the left
19 knee, bilateral shoulder capsulitis, and muscle contraction headaches.
20 (AR 385.) He determined that she would not be able to: 1) lift more
21 than five pounds; 2) stand or walk for more than ten minutes; or
22 3) sit still for more than an hour at a time. (AR 386.) He also
23 opined that Plaintiff was totally and permanently disabled and that
24 she would not be able to perform any work. (AR 388.)

25 In his decision, the ALJ noted Dr. Johnson's examination findings
26 but rejected his opinion regarding Plaintiff's functional limitations.
27 (AR 23-24.) The ALJ determined, instead, that Plaintiff could lift
28 and carry up to 20 pounds occasionally and ten pounds frequently and

1 that she could stand, walk, and sit for no more than six hours in an
2 eight-hour workday. (AR 26.) He determined further that she must be
3 permitted to alternate between sitting and standing to relieve pain
4 and that she should avoid unprotected heights, hazards, and moving
5 machinery. (AR 26.)

6 The ALJ provided two reasons for rejecting Dr. Johnson's
7 limitations. First, he found that Dr. Johnson's examination findings
8 were inconsistent with the other medical evidence. (AR 23-24.) This
9 is a valid reason for rejecting a doctor's opinion. See *Batson v.*
10 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004)
11 (confirming ALJ may disregard doctor's opinion that is unsupported by
12 the record as a whole). And the record supports the ALJ's
13 determination that Dr. Johnson's findings were inconsistent with the
14 other doctors' findings. For example, examining internist Sean To
15 found that Plaintiff walked with a normal gait and that she had no
16 tenderness in her abdomen or joints, except for in her hands and
17 knees. (AR 369, 370.) He found Plaintiff's range of motion within
18 normal limits, except for her knees, which had a decreased range of
19 motion, and her lumbar spine, which had decreased flexion. (AR 370.)
20 Unlike Dr. Johnson, Dr. To found no S4 heart gallop. (AR 369.) Dr.
21 To opined that Plaintiff could lift and carry 25 pounds frequently and
22 50 pounds occasionally and that she could stand or walk for six hours
23 in an eight-hour workday. (AR 371.) Dr. To also opined that
24 Plaintiff would have no restrictions in sitting or in the use of her
25 hands, and could occasionally walk on uneven terrain. (AR 371.)¹

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28 ¹ Dr. To's functional determination was endorsed by the October
2005 assessment of reviewing physician Samuel Grossman. (AR 431-38.)

1 Dr. Johnson's findings were also inconsistent with Dr. Mark
2 Glasberg's findings. (AR 144-47.) Dr. Glasberg opined that, from a
3 neurological standpoint, Plaintiff was unrestricted in her ability to
4 lift, carry, walk, bend, kneel, stoop, or sit. (AR 146-147.)

5 State agency reviewing physician L.C. Chiang opined that
6 Plaintiff could lift and carry up to 20 pounds occasionally and ten
7 pounds frequently; stand, walk, and sit for six hours in an eight-hour
8 workday; and occasionally balance, stoop, kneel, crouch, and crawl.
9 (AR 150-52.)

10 In fact, the only doctor who agreed with Dr. Johnson's dire
11 assessment of Plaintiff was her treating physician Emmanuel Ayodele.
12 He opined that Plaintiff could sit for no more than two hours and
13 stand or walk for no more than one hour in an eight-hour workday. (AR
14 361.) Dr. Ayodele also opined that Plaintiff could never lift
15 anything heavier than five pounds and that she would be precluded from
16 using her fingers or hands for fine manipulation. (AR 362, 363.) The
17 ALJ rejected Dr. Ayodele's assessment, however, on the ground that it
18 was not supported by his own progress notes. Plaintiff has not
19 challenged that finding here.

20 The ALJ's second reason for rejecting Dr. Johnson's functional
21 assessment was that he had made a mistake when he recorded Plaintiff's
22 weight. (AR 24.) The ALJ concluded that, as a result, "it is
23 reasonable to question [Dr. Johnson's] ability to carry out the more
24 difficult parts of the examination, such as the cardiac exam and
25 testing for Tinel's signs and Phalen's tests." (AR 24.) This was not
26 a valid reason for rejecting the doctor's opinion. Nevertheless, the
27 Court finds that the ALJ primarily, and legitimately, relied on the
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1 fact that Dr. Johnson's opinion was inconsistent with the medical
2 evidence and, therefore, will not disturb his conclusion.²

3 2. The ALJ's Credibility Determination

4 In her second claim of error, Plaintiff contends that the ALJ
5 erred when he found that her testimony was not credible. (Joint Stip.
6 at 16.) Here, the Court agrees with Plaintiff.

7 ALJ's are tasked with judging the credibility of witnesses.
8 Where a claimant has produced objective medical evidence of an
9 impairment which could reasonably be expected to produce the symptoms
10 alleged and there is no evidence of malingering, the ALJ can only
11 reject the claimant's testimony for specific, clear, and convincing
12 reasons. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). In
13 making a credibility determination, the ALJ may take into account
14 ordinary credibility evaluation techniques as well as the claimant's
15 daily activities. *Id.* at 1284. If the ALJ's credibility finding is
16 supported by substantial evidence in the record, the Court may not
17 engage in second-guessing. *Thomas*, 278 F.3d at 959.

18 Plaintiff testified that she had pain in both knees, that the
19 pain in her right knee was more severe, and that her knee gives out
20 when she walks. (AR 44.) When asked about her knee pain on a scale
21 of one to ten, with ten being the most severe, Plaintiff testified
22 that her right knee pain is an eight. (AR 44.) She explained that
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24 ² The Court notes that the ALJ cited to Exhibit C-5F, pages 4-
25 13, numerous times in his decision. (AR 23, 24, 25.) These pages do
26 not exist. Exhibit C-5F consists of three pages. (AR 163-65.)
27 Clearly, it would be as unreasonable for the Court to overturn the
28 ALJ's decision based merely on the fact that he made a mistake in
citing the record as it was for the ALJ to reject Dr. Johnson's
opinion because he made a mistake recording Plaintiff's weight.

1 she takes medication but that it does not relieve the pain entirely.
2 (AR 44.) She rated her average low back pain at a nine out of ten,
3 with ten indicating "a lot of pain." (AR 45.) Plaintiff testified
4 that she has had seizures since she was 36 years old, that she has
5 asthma and breathing problems, that she gets out of breath going up
6 stairs, and that she gained weight and now weighs 230 pounds. (AR 45-
7 46.) In addition, Plaintiff testified that she could lift seven to
8 eight pounds, that she could not stand for more than 15-20 minutes at
9 a time, and that she could sit for two hours at a time in a work
10 chair. (AR 47-48.) Lastly, Plaintiff testified that her daughter
11 helps her out with shopping and chores and that, though she can drive,
12 she does not due to fear of having a seizure. (AR 48-49.)

13 The ALJ found that Plaintiff's statements concerning her symptoms
14 were not credible to the extent that they were inconsistent with his
15 residual functional capacity determination. (AR 26.) Though the ALJ
16 provided five reasons for discounting her testimony, as set forth
17 below, none of them is adequate.

18 The first reason the ALJ gave for finding Plaintiff not credible
19 was that her medical records did not reveal the "type of impairment
20 (e.g., disc herniation with nerve root compression; subluxation of a
21 knee joint) that could be expected to cause such considerable
22 limitations." (AR 26.) Perplexingly, in the next sentence, the ALJ
23 contradicted this finding, writing "[a]s for her testimony regarding
24 musculoskeletal problems, the medical evidence does convey that she
25 has back and knee pain." (AR 26.) On the following page, the ALJ
26 noted that the record shows that Plaintiff has "a moderate low back
27 impairment." (AR 27.) The ALJ also set out that Plaintiff's knee X-
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1 ray showed "DJD" (degenerative joint disease) and arthritis.³ (AR 27,
2 183, 184.) Thus, the record contains objective evidence of
3 impairments that might cause limitations. (AR 182-84.) Furthermore,
4 to the extent that the ALJ appeared to require one of a number of
5 ailments--such as disc herniation or subluxation of a joint--to
6 support Plaintiff's allegations, he was impermissibly substituting his
7 own medical opinion for that of the physicians of record. This is
8 prohibited. See *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir.
9 1975); *Arquette v. Astrue*, 2010 WL 4916603, at *4 (C.D. Cal. Nov. 24,
10 2010).

11 The ALJ's second reason for discounting Plaintiff's testimony was
12 that she had not had any emergency room visits or hospitalizations,
13 stemming from her back and knee problems. (AR 26.) This, too, is
14 inadequate. Though, in general, a failure to seek or receive
15 treatment is a legitimate reason for discounting a claimant's
16 testimony, see *Burch*, 400 F.3d at 681, Plaintiff's failure to go to
17 the hospital does not establish that she was not in pain. Plaintiff
18 was taking medication to treat her pain. (AR 44.) The fact that she
19 had not visited an emergency room or been hospitalized does not
20 logically undermine her testimony that her constant pain limits her
21 ability to work.

22 The ALJ's third reason for rejecting Plaintiff's testimony was
23 that she had not complained of significant side effects from her
24 medication. (AR 26.) In fact, the record shows that Plaintiff
25 complained that her medication caused her drowsiness, stomach pain,
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27 ³ The Court also notes that, without citation to any authority,
28 medical or otherwise, the ALJ opined that Plaintiff's excessive weight
"undoubtedly causes her additional back and joint problems." (AR 27.)

1 nausea, and diarrhea. (AR 124, 126.) Even accepting that these
2 symptoms do not constitute "significant" side effects, the Court still
3 questions how, without further explanation, the absence of strong side
4 effects shows that Plaintiff was not credible when she testified, in
5 essence, that she could not work. The medications she was taking did
6 not control her pain. Thus, the Court concludes that this reason is
7 not convincing.

8 The ALJ's fourth reason was based on the fact that Plaintiff
9 testified that she had asthma and breathing problems but there had
10 been no diagnosis of asthma in the record. (AR 26.) Though
11 Plaintiff's statement might be characterized as an untruth, a more
12 reasonable interpretation is that she was either offering her own
13 opinion about her condition or she was exaggerating. Nevertheless,
14 the Court finds that this inconsistency tends to support the ALJ's
15 credibility determination.

16 Finally, the ALJ's fifth reason for rejecting Plaintiff's
17 testimony was that, "[r]egarding her daily activities she did not
18 depict her activities as rigorous. However, she did state that she is
19 able to drive a car (although she chooses not to)." (AR 26.) This is
20 far from a convincing reason for questioning Plaintiff's credibility.
21 Indeed, Plaintiff's statement that her activities were not rigorous is
22 consistent with her allegations. Her decision not to drive is based
23 on the fact that she has had seizures and is afraid she might have one
24 when she is driving. (AR 49.) The ALJ did not cite any activities
25 that would undermine Plaintiff's claim that she was not capable of
26 working. *C.f. Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
27 (noting that daily activities may be grounds for adverse credibility
28 finding "if a claimant is able to spend a substantial part of [her]

1 day engaged in pursuits involving the performance of physical
2 functions that are transferable to a work setting.") (quotation
3 omitted).

4 In the end, of the five reasons relied on by the ALJ for finding
5 that Plaintiff was not credible, only one of them is arguably valid,
6 i.e., that Plaintiff's testimony that she had asthma and breathing
7 problems was not supported by objective medical evidence. It is hard
8 to say that this testimony alone is enough to discount Plaintiff's
9 entire testimony. More importantly, it is not clear to the Court
10 whether the ALJ would have found Plaintiff not credible for this
11 reason alone. See *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
12 1155, 1162 (9th Cir. 2008) (stating that the "relevant inquiry. . . is
13 whether the ALJ's decision remains legally valid," despite errors in
14 the credibility analysis). As such, remand is warranted. On remand,
15 the ALJ will have a chance to reconsider the credibility
16 determination. In doing so, he is not limited in his analysis and may
17 consider any factors he deems relevant in determining credibility.

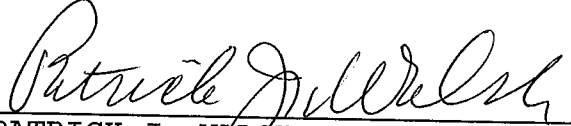
18 IV.

19 CONCLUSION

20 For these reasons, the Agency's decision is reversed and the case
21 is remanded for further proceedings consistent with this memorandum
22 opinion and order.

23 IT IS SO ORDERED.

24 DATED: December 28, 2010

25 
26 PATRICK J. WALSH
27 UNITED STATES MAGISTRATE JUDGE

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